IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 213 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

SUNDEEP CONSTRUCTION PVT LTD

Appearance:

1. INCOME TAX REFERENCE No. 213 of 1991
MR MANISH R BHATT for Petitioner No. 1
MR RK PATEL for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 18/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

In this reference under Section 256 (2) of the Income-tax Act, 1961 ('the Act' for short) at the instance of the revenue, following question is referred for our opinion in respect of the assessment year 1982-83:

"Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the assessee is an industrial company within the meaning of section 2 (7) (c) of the Finance Act, 1982 and hence entitled to the benefit claimed?"

2. We have heard Mr. Manish R. Bhatt, learned standing counsel for the revenue and Mr. R.K. Patel, learned counsel for the respondent - assessee.

3. The assessee is a building contractor and had undertaken contracts from Gujarat Mineral Development Corporation, Ahmedabad for removal of overburden and earth excavation in Lignite Mineral areas of the GMDC. Sub-clause 3 (a) of the agreement provided as follows:

"The work required to be executed by the contractor is the removal of overburden/earth excavation in Lignite mineral areas of the employer, the layer/depth whereof ranges from 8 to 30 metres approximately, which has to be removed so as to expose the lignite mineral for further mining. The removal of overburden/earth excavation has to be done by the contractors by preparing benches of the requisite height/length as per mining rules/regulations and instructions issued from time to time by the Mines Manager/Engineer-in-charge of the employer".

The assessee contended that the assessee was engaged in mining and was, therefore, entitled to the benefit of lower rate of Income-tax as provided by the Finance Act, 1982.

Schedule A to the Finance Act, 1982 provides the rates of Income-tax. The relevant portion reads as under:

"RATES OF INCOME-TAX

(I) In the case of a domestic company,--

(1) where the company is a company in which the public are substantially interested,--

... .

(2) where the company is not a company in which the public are substantially interested,--

(i) in the case of an industrial company,--

...."

Industrial Company is defined in Section 2 (7) (c) as under:

"industrial company" means a company which is mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining.

Explanation: For the purposes of this clause, a company shall be deemed to be mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining, if the income attributable to any one or more of the aforesaid activities included in its total income of the previous year (as computed before making any deduction under Chapter VIA of the Income-tax Act) is not less than fifty-one per cent of such total income".

The assessee claimed the aforesaid benefit on the basis that it is an industrial company as defined by Section 2 (7) (c) of the Finance Act, 1982.

4. The ITO rejected the assessee's claim as an industrial company. The CIT (Appeals) also rejected the assessee's claim on the ground that the assessee had undertaken only the contract work and was not engaged in mining operations. According to Commissioner, although the removal of overburden and excavation is a process performed on earth, it cannot be called 'processing of goods' because earth is not converted into some other form by performance of such process.

In appeal, the Tribunal considered the definition of "industrial company" and held that it was not necessary that the assessee should be engaged in the processing of goods and it would be sufficient if the assessee is engaged in mining alone. The Tribunal allowed the appeal. Hence this reference at the instance of the revenue.

5. Mr. Manish R. Bhatt, learned standing counsel for the revenue, has submitted that the assessee is not even engaged in mining. All that the assessee does is the removal of overburden and earth excavation. The assessee does not go beyond the earth excavation, because when the Lignite is exposed it is the GMDC which does the mining and therefore the activity which the assessee does is merely preparatory work for "mining" properly so called.

6. On the other hand, Mr. R.K. Patel, learned counsel for the respondent - assessee, has submitted that what the assessee is doing is not merely removal of overburden or scratching the surface as contended, but the assessee has to excavate the earth layer of 8 to 30 metres so as to expose the lignite mineral for further mining. The learned counsel has placed emphasis both on the depth and layer of 8 to 30 metres and also the expression "further mining".

It is submitted that because the mineral is embedded in earth at such depth ranging from 8 to 30 metres, GMDC employs the assessee for the earth excavation by preparing benches of the requisite height/length as per the mining rules/regulations and instructions issued from time to time by the Mines Manager/Engineer-in-charge of the employer. It is submitted that because the work assigned to the assessee in the contract is so technical that it is required to be done as per the mining rules/regulations and under the instructions issued from time to time by the Mines Manager/Engineer-in-charge of the employer.

7. Having heard the learned counsel for the parties, it appears to us that the finding given by the Tribunal that the assessee is engaged in mining is a finding based on facts of the instant case which are apparent from the relevant clause in the contract and the inference drawn by the Tribunal on the basis of such facts does not appear to be unreasonable. The depth of the earth which is required to be excavated by the assessee ranges from 8 to 30 metres which is required to be done so as to expose

the lignite mineral for " further mining" by GMDC. The entire earth excavation work which is to be done by the assessee is required to be done as prescribed under the mining rules/regulations and is to be carried out under the instructions issued from time to time by the Mines Manager/Engineer-in-charge of the GMDC. In our view, therefore, the assessee has satisfactorily discharged the burden of showing that it is a company which is mainly engaged in mining and, therefore, an "industrial company" as defined by Section 2 (7) (c) of the Finance Act, 1982, and hence entitled to the benefit claimed.

Under the circumstances, we answer the question in the affirmative i.e., in favour of the assessee and against the revenue.

The reference accordingly stands disposed of.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

(karan)